

Dissenting Views to Accompany H.R. 3369, the “Nonprofit Athletic Organization Protection Act of 2003”

We strongly oppose H.R. 3369, the “Nonprofit Athletic Organization Protection Act of 2003,” which would extend immunity to nonprofit athletic organizations in lawsuits arising from claims of ordinary negligence relating to the passage or adoption of rules for athletic competitions and practices. While proponents maintain this legislation was designed to protect nonprofit athletic organizations from unnecessary litigation relating to physical safety regulations, its effects would all but eliminate any valid claims brought against such organizations, including civil rights claims. This is why the legislation is so strongly opposed by civil rights groups, such as the NAACP, Alliance for Justice, American Association of People with Disabilities (AAPD), Lawyers’ Committee for Civil Rights Under Law, National Association for the Advancement of Colored People (NAACP), National Partnership for Women, National Women’s Law Center, People For the American Way, and U.S. Public Interest Research Group (U.S. PIRG).

H.R. 3369 is problematic for several reasons. First, under H.R. 3369, valid cases would be affected as well as frivolous claims. Second, this legislation is overly broad. It would go beyond the “physical harm” claims the sponsors state are intended to be encompassed by the legislation and would affect discrimination (including, significantly, Title IX claims), labor, and any other matter that arises from nonprofit athletic organizations’ rules for practices and competitions. Third, this legislation provides one-way immunity -- the nonprofit athlete organization would receive immunity yet retain its right to sue.

A. The legislation does not differentiate between meritorious lawsuits and frivolous claims.

The broad immunity that is extended to nonprofit athletic organizations reaches far beyond the potential for “frivolous” lawsuits. H.R. 3369 prohibits civil litigation of any grievance arising under the rules promulgated by a nonprofit sporting organization. Specifically, H.R. 3369 exempts a nonprofit athletic organization from liability for harm caused by an act or omission in the adoption of rules for sanctioned or approved athletic competitions or practices if: (1) the organization was acting within the scope of its duties; (2) the organization was properly licensed, certified, or authorized for the competition or practice; and (3) the harm was not caused by the organization's willful or criminal misconduct, gross negligence, or reckless misconduct.

So while a lawsuit filed by parents because their child was not put on a team may rightly be dismissed (and would be dismissed under current law without the benefit of this legislation), cases with legal merit, such as a case challenging a rule that endangers the life of a child, would also be dismissed. In effect, this legislation will bar young athletes and their families from having their day in court for an entire range of legal actions – frivolous as well as non-frivolous. H.R. 3369 would dramatically obstruct valid, meritorious claims that call attention to public safety hazards, discriminatory practices, and are needed to protect our nation’s children.

B. H.R. 3369 goes far beyond cases involving physical harm and impacts civil rights and other cases

Proponents of the legislation claim that it is designed to narrowly limit a nonprofit athletic organizations' immunity in "physical harm" claims. However, the effect of the bill is vast and far reaching.

First and foremost, H.R.3369 would provide broad immunity to nonprofit athletic organizations in civil rights matters. As Professor Andrew Popper stated in his testimony before the Committee, "If passed, the bill would block anti-discrimination cases that have been used to address race, disability, and gender discrimination. In addition to destroying the opportunity for an athlete to challenge discriminatory practices (while placing no limit on an organizations ability to use courts), the bill would preempt state laws for no discernible reason."¹

Consider the following civil rights actions brought against athletic organizations that would have been precluded had H.R. 3369 been law:

- In *Cureton v. NCAA*, a class action lawsuit filed by African-American student, athletes challenged the National Collegiate Athletic Association's rule requiring all potential student-athletes to achieve a minimum score on the SAT or the ACT. Educational Testing Services (ETS), designers of the SAT, had long cautioned the NCAA that use of a fixed cut-off score would have a disproportionate impact on African-American students. Only when African-Americans brought a civil action did the NCAA change its rule so that student athletes could be eligible for Division I schools on the basis of their grades, not just their test scores.²
- In *PGA Tour, Inc. v. Martin*, the U.S. Supreme Court ruled that the Americans with Disabilities Act requires the PGA Tour to allow professional golfer Casey Martin to ride in a golf cart between shots at Tour events. Martin suffers from a circulatory disorder making it painful for him to walk long distances; despite appeal after appeal, the nonprofit PGA continued to rule that walking the course is an integral part of golf, and that Martin would gain an unfair advantage using the cart. In a 7-2 decision, the Supreme Court decided that the PGA could not deny Martin equal access to its tours on the basis of his disability. It took a lawsuit to enforce "what Congress described as a 'compelling need' for a 'clear and comprehensive national mandate' to eliminate discrimination against disabled individuals."³ Under H.R. 3369, a comparable case brought against a non-profit athletic association would be banned.
- In *Michigan High School Athletic Association v. Communities for Equity*, a federal district court found that scheduling the women's athletics during nontraditional seasons resulted in limited opportunities for athletic scholarships and collegiate recruitment, limited opportunities to play in club or Olympic development programs, and missed opportunities for awards and recognition for female athletes. It was only through civil

¹Legislative Hearing on H.R. 3369, "Nonprofit Athletic Organization Protection Act of 2003": Hearing before the House Comm. On the Judiciary 108th Cong. 4 (2004)[hereinafter *Hearings*](written testimony of testimony of Andrew Popper, Professor of Law, American University, Washington College of Law)

²Cureton v. NCAA, 198 F.3d 107 (3rd Cir. 1999).

³PGA Tour, Inc. v. Martin, 532 U.S. 661, 675 (2001).

litigation that this practice of discrimination was publicly identified, addressed by the legal system, and corrected to level the playing field for all involved.

- In *Williams v. Eaton*, 468 F. 2d 1079 (10th Cir. 1972), several black athletes were dismissed from the University of Wyoming football team following a dispute over their plan to wear black armbands during a game with Brigham Young University. Under the terms of this bill, the athletes would not be permitted to bring the suit forward.⁴
- In *Williams v. the School District of Bethlehem, PA*, 998 F. 2d 168, Mr. Williams wanted to try out for the field hockey team but was banned because the field hockey team was an all female team. Damages were sought by Williams under Title IX of the Education Amendments of 1972. The 3rd Circuit court remanded to the lower court to find whether there were real differences between the males and females, which warranted different treatment. Had H.R. 3369 been law, this type of action would be precluded.
- In *Pryor v. NCAA*, 288 F. 3d 548, the NCAA adopted a policy that raised academic standards for student athletes in their freshman year. The complaint alleged that the policy's real goal was to "screen out" more black student athletes from ever receiving athletic scholarships in the first place. The Court held that the Title VI and 42 USCS § 1981 allegations were sufficient to withstand a motion to dismiss. The association had considered race as one of its reasons for adopting the policy and the complaint alleged that the association purposefully discriminated against black student athletes because it knew policy would prevent more black athletes from ever receiving athletic scholarship aid. The association could not avoid § 1981 liability simply because the condition of not meeting academic standards was not satisfied, if that condition was an alleged produce of purposeful discrimination.
- In *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265, female athletes, filed an action against the state board of education and the state high school athletic association, alleging that defendants discriminated against them on the basis of sex by sanctioning fewer sports for girls than for boys and by refusing to sanction girls' interscholastic fast-pitch softball. The complaint asserted claims under the Equal Protection Clause and Title IX of the Education Amendments of 1972.

H.R. 3369 would immunize nonprofit athletics in several other claims including antitrust, labor, environmental, defamation, fraud and numerous other actions not based on physical harm. The following are examples of claims that would not be permitted under this legislation:

- In *NCAA v. Board of Regents of the University of Oklahoma*, 486 U.S. 85, the Athletic Association adopted a rule to reduce the number of football games that could be televised. The University of Oklahoma objected to the rule and negotiated a contract to allow a liberal number of games to be televised. NCAA took disciplinary action, and a suit followed stating that the NCAA engaged in Sherman Act violations. The Supreme

⁴The court ultimately found that permitting the armbands would have been a violation of "the First Amendment establishment clause and its requirement of neutrality on expressions relating to religion."

Court held that the NCAA plan constituted a restraint upon the operations of the free market and that its television plan had a significant anti-competitive effect.

- In *Tiffany v. Arizona Interscholastic Association, Inc.*, 726 P.2d 231, a student filed a suit against the Arizona interscholastic association competition requesting that the associations be enjoined from disqualifying Tiffany from interscholastic athletic competition and that the association's actions be declared unconstitutional as a denial of due process. The lower court granted a preliminary injunction and found that the association acted unreasonably in considering Tiffany's waiver from disqualifications and that Tiffany had a sufficient liberty interest in high school athletics so as to have rendered associations's denial a constitutional violation. The court held that the association did act arbitrarily in exercising its discretion in denying Tiffany's waiver because although the association's bylaws allowed for a waiver of disqualification upon the showing of hardship, the association also had a policy of not making any exception to an age eligibility requirement under which Tiffany took exception.

This legislation would also inadvertently protect individuals who could potentially harm children. During the Judiciary Committee markup, Representative Lofgren remarked that if a poor hiring rule was in place that did not screen out pedophiles, parents would be barred from suing the athletic association regarding that rule. While the sponsors claim their true intent was to eliminate physical harm claims, the legislation, as drafted, eliminates any and all civil actions relating to practices and procedures of a non-profit athletic organization.

C. H.R. 3369 provides one way immunity.

Significantly, while immunizing nonprofit athletic organizations from civil claims, H.R. 3369 protects the right of a nonprofit athletic organization to sue others.⁵ If this legislation is designed to suppress unnecessary litigation altogether, it fails to describe how an organization's grievances are legitimate but individual complaints are not. Written to suppress the only outlets available to athletes and their families, this legislation is overreaching. It is unfair to provide that these organizations be allowed to have their day in court while limiting the ability of individual athletes and others to hold them accountable.

Conclusion

As we have in the past, we are willing to work with the Majority to develop reasonable legislation that protects non-profit groups from unnecessary litigation while insuring that meritorious claims are protected. H.R. 3369 however, does not meet this test. Instead of protecting good faith and reasonable actions by non-profit athletic associations designed to protect athletes from physical harm, the bill massively overreaches and cuts of legitimate actions for civil rights and other matters having nothing to do with physical harm.

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⁵H.R. 3369, sec. 3(b).

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